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In the Supreme Court of the United States

OCTOBER TERM, 1959

PRESLEY GREGORY, PETITIONER

v.

HONORABLE WILLIAM J. CAMPBELL, CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The order of the Court of Appeals (Pet. App. 1a) is unreported. The order of the District Court is also unreported.

JURISDICTION

The order of the Court of Appeals was entered on November 5, 1959 (Pet. App. 1a). The petition for a writ of certiorari was filed on December 7, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in denying petitioner's application for a writ of mandamus to

annul a District Court order directing separate trials of the issues of liability and damages in a personal injury action.

2. Whether the District Court for the Northern District of Illinois lawfully promulgated Civil Rule 21 which provides that in a civil action the court may, in its discretion, order a trial on the single issue of liability before trying the other issues in the litigation.

CONSTITUTIONAL PROVISION AND RULES INVOLVED

1. United States Constitution, Seventh Amendment:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

2. Rule 42(b), Federal Rules of Civil Procedure:

> *Separate Trials.* The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counter-claims, third-party claims, or issues.

3. Rule 83, Federal Rules of Civil Procedure:

> *Rules by District Courts.* Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the Supreme Court of the United States. In

all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules.

4. Rule 21 of the Civil Rules of the United States District Court for the Northern District of Illinois, adopted November 2, 1959:

> Pursuant to and in furtherance of Rule 42 (b), Federal Rules of Civil Procedure, to curtail undue delay in the administration of justice in personal injury and other civil litigation wherein the issue of liability may be adjudicated as a prerequisite to the determination of any or all other issues, in jury and non-jury cases, a separate trial may be had upon such issue of liability, upon motion of any of the parties or at the Court's direction, in any claim, cross-claim, counterclaim or third-party claim.
>
> In the event liability is sustained, the Court may recess for pre-trial or settlement conference or proceed with the trial on any or all of the remaining issues before the Court, before the same jury or before another jury as conditions may require and the Court shall deem meet.
>
> The Court, however, may proceed to trial upon all or any combination of issues if, in its discretion, and in furtherance of justice, it shall appear that a separate trial will work a hardship upon any of the parties or will result in protracted or costly litigation.

STATEMENT

This action was brought by petitioner in the District Court for the Northern District of Illinois against the Chicago, Milwaukee, St. Paul and Pacific

Railroad Company on March 26, 1957. Jurisdiction was based on diversity of citizenship. 28 U.S.C. 1332. In his complaint, petitioner alleged that as a result of the railroad's negligence he sustained severe and permanent injuries, both externally and internally. The accident occurred on March 13, 1957, on a railroad crossing, when the taxicab which petitioner was driving collided with a locomotive operated by the defendant railroad. On October 6, 1958, petitioner's action was consolidated with a suit brought against the railroad and petitioner's employer by the administrators of the estates of cab passengers killed in the collision.

Civil Rule 21 adopted by the District Court "[p]ursuant to and in furtherance of Rule 42(b), Federal Rules of Civil Procedure, to curtail undue delay in the administration of justice in personal injury and other civil litigation", *supra*, p. 3, provides that the court may order a separate trial on the issue of liability prior to the determination of any other issues if it does not "appear that a separate trial will work a hardship upon any of the parties or will result in protracted or costly litigation." If the jury finds liability, the court may recess for a pre-trial or settlement conference or proceed directly to a trial of the remaining issues by the same or another jury "as conditions may require and the Court shall deem meet."

Pursuant to this rule, on November 3, 1959, the District Court (Campbell, Chief Judge, the respondent) ordered a separate trial in the consolidated action before a jury on the single issue of liability. On November 4, 1959, petitioner unsuccessfully moved

Judge Campbell to vacate the order. The next day, petitioner filed an emergency petition for a writ of mandamus in the Court of Appeals for the Seventh Circuit, praying that Judge Campbell's order of November 3, 1959, be annulled. Petitioner urged that the contemplated procedure denied him his right to trial by jury and conflicted with the Federal Rules of Civil Procedure. The Court of Appeals denied the petition (Pet. App. 1a).

ARGUMENT

The decision of the Court of Appeals is clearly correct. First, the rule of the District Court, and the order issued pursuant to that rule, may not be challenged by way of a proceeding for mandamus at this stage of petitioner's litigation. In any event, the District Court's order and the local rule are valid; what petitioner seeks to derogate as an unconstitutional infringement was no more than an implementation, by way of the court's rulemaking power, of Rule 42(b) of the Federal Rules of Civil Procedure. Moreover, there is no conflict with the rulings of other courts. Accordingly, review by this Court is not warranted.

1. The effect of the District Court's challenged order is that petitioner will be obliged to persuade a jury of the merits of his claim that the defendant railroad is liable for the injuries he suffered in the collision, before he will be permitted to present to a jury evidence of the magnitude of his injuries. Clearly, there is no appealable order at this stage. See *Metalock Repair Service, Inc.* v. *Harman*, 216

F. 2d 611 (C.A. 6); *Skirvin* v. *Mesta*, 141 F. 2d 668 (C.A. 10). Nor is this a case in which mandamus could properly have been granted, for its grant would have been "a 'plain evasion' of the Congressional enactment that only final judgments be brought up for appellate review." *Roche* v. *Evaporated Milk Association*, 319 U.S. 21, 30; accord, *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546. "This is not a case where a court has exceeded or refused to exercise its jurisdiction * * *, nor one where appellate review will be defeated if a writ does not issue * * *." *Parr* v. *United States*, 351 U.S. 513, 520. Petitioner may, of course, challenge the validity of the District Court rule, and of Judge Campbell's order, after final judgment is entered, if the outcome of the trial is believed to be adverse to his interests. The decision below denying mandamus is therefore in accord with the long-standing "policy against piecemeal appeals." *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U.S. 176, 178.

2. Furthermore, petitioner has fallen far short of presenting a "clear and indisputable" showing,[1] necessary for the issuance of the writ of mandamus, that Civil Rule 21 of the District Court for the Northern District of Illinois is invalid.

(*a*). Rule 83 of the Federal Rules of Civil Procedure, *supra*, pp. 2–3, authorizes the adoption by each District Court of "rules governing its practice not inconsistent with these rules." The local rule here challenged was adopted to implement Rule 42(b) of the Federal Rules of Civil Procedure, *supra*, p. 2. Under Rule 42(b), the District Court "in furtherance

[1] *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 384.

of convenience or to avoid prejudice may order a separate trial of any *claim* * * * or of any separate *issue* * * *" (emphasis added). It is plain on its face that Rule 42(b) contemplates the possibility of a separate trial on the merits of less than an entire "claim", *i.e.*, on an "issue"; and, obviously, the question of whether the defendant is liable to the plaintiff in a personal injury action is a significant "issue" in the action. The courts have therefore universally held that the District Courts are empowered to order a separate jury trial on the issue of liability as a prerequisite to holding a jury trial on the issue of damages.[2] *United States* v. *Burnett*, 262 F. 2d 55 (C.A. 9); *Nettles* v. *General Accident Fire and Life Assurance Corp.*, 234 F. 2d 243 (C.A. 5); *Hassett* v. *Modern Maid Packers, Inc.*, 23 F.R.D. 661 (D. Md.); *Lyophile-Cryochem Corp.* v. *Chas. Pfizer & Co.*, 7 F.R.D. 362 (E.D.N.Y.); *Rickenbacher Transportation, Inc.* v. *Pennsylvania R. Co.*, 3 F.R.D. 202 (S.D. N.Y.); 2 Barron & Holtzoff, *Federal Practice and Procedure* § 943; 5 Moore, *Federal Practice* ¶ 42.03; cf. *Schybinger* v. *The Interlake Steamship Co.*, C.A. 7, No. 12700, decided December 29, 1959, slip op., p. 10.[3]

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[2] The cases cited by petitioner, *McClain* v. *Socony-Vacuum Oil Co.*, 10 F.R.D. 26 (S.D. Mo.); *United States ex rel. Rodriguez* v. *Weekly Publications, Inc.*, 9 F.R.D. 179 (S.D. N.Y.), are not in conflict with this proposition. Both District Courts in those cases approached the problem of whether to order separate trials on the issues of liability and damages as one involving the discretionary exercise of an existing power. Neither case indicates any doubt as to the power of the District Court to order a separate trial on the issue of liability in appropriate cases; they merely declare that it was deemed inadvisable to do so in the circumstances of those cases.

[3] This Court, in *Dalehite* v. *United States*, 346 U.S. 15, a non-jury tort action, noted without objection that a trial had been

The District Court for the Northern District of Illinois, in its local Civil Rule 21, merely sought to put this pre-existing *ad hoc* practice on a regular basis. In adopting the rule, the District Court was motivated by the expectation that a more frequent use of the procedure permitted by Rule 42(b), F.R. Civ. P., would work towards a lessening of calendar congestion in the court.[4] Previous studies had indicated that as many as forty percent of personal injury cases ended in verdicts for the defendant (Zeisel, Kalven & Buchholz, *Delay in the Court*, 99), and, thus, the time and expense of introducing evidence of damages in those cases was wasted. In addition to avoiding this unnecessary waste, it is expected that the rule will tend to stimulate settlements before trial and settlements after a verdict in favor of the plaintiff on the issue of liability.

(*b*). Petitioner's constitutional objections are equally without merit. In essence, it is petitioner's argument that the District Court was without power to order a jury trial of less than all the issues involved in his litigation because the courts at common law, as it existed when the Seventh Amendment was adopted in 1791, lacked such power in similar cir-

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conducted in the District Court on the single issue of the Government's liability for the injuries arising out of the Texas City disaster: the issue of damages had been deferred until the issue of liability was settled.

[4] The existence of calendar congestion in the federal courts needs no documentation. The problem has been recognized by both the Bench and Bar. See, *e.g.*, Warren, *Delay and Congestion in the Federal Courts*, 42 J. Am. Jud. Soc. 6; 1958 *Proceedings of the Attorney General's Conference on Court Congestion and Delay in Litigation.*

cumstances.[5] It is apparent that petitioner's broad attack on the practice of separating issues for trial goes not merely to the validity of local Civil Rule 21, but also to Rule 42(b), F.R. Civ. P.[6] Indeed, his argument, if accepted, would invalidate all of the Federal Rules of Civil Procedure which in any way represent a change from the procedure governing the conduct of jury trials in 1791. The words of Mr. Justice Brandeis, in *Ex parte Peterson*, 253 U.S. 300, 309–310, furnish the answer:

> * * * The command of the Seventh Amendment * * * does not require that old forms of practice and procedure be retained. * * * New devices may be used to adapt the ancient institution to present needs and to make of it an

[5] In support of this proposition, petitioner refers to Millar, *Civil Procedure of the Trial Court in Historical Perspective* (1952). It is interesting to note that this authority, after stating the common-law rule as indicated by petitioner, proceeds to trace the historical development of procedural reform as regards the power of the court to regulate the sequence in which the issues of fact will be determined by the jury. *Id.* at 272–275. Significantly, the author, in discussing Rule 42(b), F.R. Civ. P., as the culmination of this development, suggests no possible constitutional infirmity in the changes from the common-law procedure.

[6] This is actually the force of the argument which petitioner seeks to base on cases such as *United States ex rel. Rodriguez* v. *Weekly Publications, Inc.*, *supra* (fraud), and *McClain* v. *Socony-Vacuum Oil Co.*, *supra* (anti-trust). Given a case in which the proof of damage is inseparably linked to proof of liability, as may have been true in those cases, a District Court would not order separation. Here, of course, there is no such problem. The question of liability easily permits of separate trial, with the problem of damages reserved until liability is determined. Local Civil Rule 21 permits the trial court to take all relevant factors into account. See *supra*, p. 3.

> efficient instrument in the administration of justice. Indeed, such changes are essential to the preservation of the right. The limitation imposed by the Amendment is merely that enjoyment of the right of trial by jury be not obstructed, and that the ultimate determination of issues of fact by the jury be not interfered with.

Accord: *e.g., Galloway* v. *United States*, 319 U.S. 372, 390; *Byrne* v. *Matczak*, 254 F. 2d 525, 529 (C.A. 3), certiorari denied, 358 U.S. 816.

On the basis of this enlightened view of the scope of the Seventh Amendment, Mr. Justice Stone, speaking for a unanimous Court in *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U.S. 494, 498, concluded "that where the requirement of a jury trial has been satisfied by a verdict according to law upon one issue of fact, that requirement does not compel a new trial of that issue even though another and separable issue must be tried again." Accord: *e.g., Devine* v. *Patteson*, 242 F. 2d 828 (C.A. 6), certiorari denied, 355 U.S. 821; *Washington Gas Light Co.* v. *Connolly*, 214 F. 2d 254 (C.A.D.C.); *May Department Stores Co.* v. *Bell*, 61 F. 2d 830 (C.A. 8).[7] The *Gasoline Products* decision undercuts

[7] In *Darbrow* v. *McDade*, 255 F. 2d 610, the Court of Appeals for the Third Circuit noted that its decision in *McKeon* v. *Central Stamping Co.*, 264 Fed. 385, relied upon by petitioner (Pet. 8, 11), had been overruled by the Supreme Court in *Gasoline Products Co.* v. *Champlin Refining Co.*, *supra*. *Hodges* v. *Easton*, 106 U.S. 408, disapproved the elimination of certain issues from consideration by the jury; contrary to petitioner's suggestion (Pet. 9), segmentation of issues was not involved. *Barney* v. *Schmeider*, 9 Wall. 248, also involved the withdrawal of issues from the jury (see Pet. 9–10).

petitioner's argument that the Seventh Amendment requires that one jury try all the issues involved in a litigation at the same time. And as the text of local Civil Rule 21 makes clear, no issue of fact will be tried by the court; there is no invasion of the province of the jury. The operation of Civil Rule 21 is intended to regulate the presentation of the issues of fact to the jury in order to make that institution a more "efficient instrument in the administration of justice." *Ex parte Peterson,* 253 U.S. 300, 310. Jury trial is fully preserved.[8]

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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[8] Petitioner contends that the procedure contemplated by Civil Rule 21 prevents litigants "from having their day in court" (Pet. 12) because proof of liability for negligence requires a showing of damage. This argument appears to be, in other words, that the rule is unconstitutional because at common law a writ for trespass on the case required an allegation of damage. This pleading contention requires no reply, but it is interesting to note that in the eighteenth century petitioner's action would have been laid in trespass *vi et armis*, and liability would not have depended on proof of damage. 1 Harper & James, *Torts* § 1.3; Prosser, *Torts* (2d ed.) § 7.

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